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No. 94-1187

In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

vs.

WILLIAM B. RICKS, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The issues in this case are:

(1) Did the Court of Appeals properly affirm the summary judgment in favor of Respondents William B. Ricks, et al. ("Good Samaritan"), finding them immune from antitrust liability under the Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11101 *et seq.*) because they afforded petitioner John Phillip Smith, M.D., proper peer review procedures and revoked his medical staff privileges in the reasonable belief that doing so was necessary to ensure patient safety, given petitioner's needless and/or egregiously sub-standard cardiology practices that caused the deaths of two patients and endangered the lives of several others?

(2) (a) Did the Court of Appeals correctly uphold the district court's award of fees and costs under Section 11113 of the Act [42 U.S.C. § 11113], on the grounds that petitioner conducted this litigation unreasonably and inappropriately and that his claims or conduct were frivolous, unreasonable, without foundation or in bad faith?

(b) Did the Court of Appeals correctly uphold the district court's determination of the amount of fees and costs awarded Good Samaritan, where: (i) The magistrate judge, to whom the calculation of fees was referred, conducted a detailed review of unredacted attorney billing statements and awarded substantially less than the actual fees and costs incurred; (ii) the district court used proper procedures in making its fees and costs award;

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

and (iii) petitioner offered no evidence that the fees and costs were unreasonable?

(3) Assuming this Court has jurisdiction to entertain this claim:

(a) Did the Court of Appeals properly order petitioner's counsel to pay Good Samaritan its reasonable appellate attorneys' fees and costs under Federal Rule of Appellate Procedure 38, on the ground that this appeal was "wholly without merit" and in some instances "absurd" and that counsel should have known his arguments were "clearly frivolous"?

(b) Did the Court of Appeals give counsel adequate notice and opportunity to be heard concerning the Rule 38 sanction by reviewing counsel's numerous submissions and reconsidering its decision *de novo* before reaffirming it?

LIST OF PARTIES

Petitioner did not include a list of parties before this Court and to the proceedings below in his Petition, as required by Supreme Court Rule 14.1(b). Good Samaritan therefore provides this list of the parties:

Petitioner: John Philip Smith, M.D.

Respondents: William B. Ricks, M.D., Michael R. Nagel, M.D., Jack Siegel, M.D., Thomas F. Murphy, M.D., David W. McCullough, M.D., Daniel J. Heinrichs, M.D., J. Robert Ulrich, M.D., Keith P. Bartel, Esq., Constantine J. Samios, M.D., Gordon Simonds, Esq., Good Samaritan Hospital of the Santa Clara Valley, Health Dimensions, Inc., Mary Anderson, Dean Bartee, Joy Drinker, J. Handel Evans, Richard Herington, Lorraine Hultquist, Marlin Krebs, Brooks Mancini, Diana Mascali, Barbara McGee, Wade Meyercord, Peter Knoll, Paul O'Neil, Barbara Peterson, and Roy Strasburger.

RULE 29.1 STATEMENT

In accordance with Rule 29.1, Respondent Health Dimensions, Inc., states that it is the only corporate Respondent in this proceeding. In May 1994, Health Dimensions, Inc., became Good Samaritan Health System (GSHS). GSHS is a non-profit corporation doing business as four separate hospitals: Good Samaritan Hospital of Santa Clara Valley; Good Samaritan Hospital - Mission Oaks; South Valley Hospital; and San Jose Medical Center. GSHS is the sole corporate member of the following organizations: Visiting Nurse Association, Inc. (VNA, Inc.), Health Dimensions Medical Foundation, dba Good Samaritan Medical Foundation, Good Samaritan Hospital of Santa Clara Valley Foundation, and Wheeler Hospital Association. VNA, Inc. is the sole corporate member of VNA Continuing Care, Inc. and Visiting Nurse Assocation Home Care, Inc. GSHS has no parent companies.

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RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL OPINIONS BELOW

Good Samaritan refers in this brief to the following orders of the Court of Appeals, copies of which appear in its Appendix: (1) the order denying petitioner's Petition for Rehearing and rejecting the Suggestion for Rehearing en Banc (Oct. 5, 1994, App. A); (2) the letter rejecting petitioner's counsel's request for additional review of the Fed. R. App. P. 38 sanction (Dec. 12, 1994, App. B); and (3) the order denying counsel's requests for extraordinary proceedings and to recall the mandate (Feb. 7, 1995, App. C).

JURISDICTION

One of the issues petitioner raises is that the Court of Appeals erroneously ordered his counsel to pay Good Samaritan its appellate fees and costs under Fed. R. App. P. 38. Counsel is the only party aggrieved by that judgment, however, and he has not petitioned. Because the only petitioner before the Court, Dr. John Smith, is not aggrieved by that judgment, he lacks standing to seek certiorari of it. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474-75 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 394 (1st Cir. 1978). Accordingly, this Court should disregard the arguments concerning the Fed. R. App. P. 38 fees and costs award against petitioner's counsel.

ADDITIONAL PERTINENT STATUTORY PROVISIONS

Ninth Circuit General Order 10.9 governs procedures for imposition of sanctions on appellate counsel. Petitioner here contends that the Court of Appeals did not follow that order when it sanctioned his counsel under Fed. R. App. P. 38. The full text of that order appears in Appendix D to this Brief.

COUNTERSTATEMENT OF THE CASE[1]

Respondents here are Good Samaritan Hospital of the Santa Clara Valley, its parent, Health Dimensions, Inc., and twenty-five individuals – eight physicians, two lawyers and fifteen members of Good Samaritan's Board of Trustees (collectively "Good Samaritan"). Petitioner, a cardiologist, sued resondents for alleged antitrust violations after Good Samaritan conducted a detailed peer review proceeding and declined to renew petitioner's hospital staff privileges. That decision was based on repeated and egregious lapses in judgment and professional competence that endangered patient safety and led to several patient deaths. The district court and Court of Appeals found Good Samaritan immune as a matter of law under the Health Care Quality Improvement Act ["the Act" or "HCQIA"], 42 U.S.C. section 11101 *et seq.* (All further statutory references are to Title 42 of the United States Code). The district court and Court of Appeals decisions (Pet. App. 28a-43a; Pet. App. 1a-22a) correctly state the background facts, and Good Samaritan

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[1] Throughout this Brief, Good Samaritan utilizes the following abbreviations: "Pet." denotes the Petition for Certiorari; "Pet. App." denotes the Appendix to the Petition for Certiorari; "App." denotes the Appendix to this Brief in Opposition; "ER" denotes the Excerpts of Record and Amended Excerpts of Record filed in the Court of Appeals; "SER" denotes the Supplemental Excerpts of Record filed in the Court of Appeals; "CR" denotes the Clerk's Record and will be followed by the district court docket number of the relevant document. Briefs filed in the Court of Appeals will be referred to as "AOB" (Appellant's Opening Brief), "AB" (Appellees' Brief), and "RB" (Reply Brief) in each appeal. Citations to the Court of Appeals' opinion here are to pages in Petitioner's Appendix rather than to the published version at 31 F.3d 1478.

hereby adopts those statements as its own. Good Samaritan adds that the district court had jurisdiction under 28 U.S.C. sections 1331 and 1337. S. Ct. R. 14.1(i), 24.2.

REASONS FOR DENYING THE PETITION

A. The Opinion Below Does Not Create A Conflict Regarding The Interpretation Of The Immunity Provisions Of The Health Care Quality Improvement Act Or The Federal Summary Judgment Standards

Petitioner's attempt to find a "certworthy" issue by spinning alleged "conflicts" out of whole cloth must fail. The decision below is in harmony with those of other Courts of Appeals that have interpreted the Health Care Quality Improvement Act's immunity provisions and the related summary judgment principles that implement them.

1. The Courts Of Appeals Are Not In Conflict Concerning The Burden Of Proof And Standard Of Review For Immunity Under The HCQIA

Peer review – the ongoing monitoring and evaluation of staff physicians – is a hospital's primary means of ensuring physicians' competence and limiting the hospital's liability for their incompetence. *Cf. Bell v. Sharp Cabrillo Hosp.*, 212 Cal. App. 3d 1034 (1989). Hospitals must have an approved peer review program to participate in federal Medicaid and Medicare programs [§§ 1395x(k), (r), (s), 1396a(19), (26)], to comply with California law [Cal. Code Regs. tit. 22, § 70701(a)(7)], and to gain accreditation by the Joint Commission on Accreditation of Healthcare Organizations [*1991 Accreditation Manual for Hospitals* at 99-120 (1991)); *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 811 (1977)].

When the peer review process identifies an incompetent physician and the hospital limits or terminates his or

her privileges, the physician often turns to the courts for redress. However, because the physician may have little or no chance of success in state court (especially given the immunities that state law affords peer review participants, *e.g.*, Cal. Civ. Code §§ 43.7, 43.8), he or she often sues in federal court under federal antitrust provisions, where state exhaustion and/or privilege provisions may not apply. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1031 (9th Cir. 1989), *aff'd*, 111 S. Ct. 1842 (1991). Even the threat of such litigation can have a devastating effect on a peer review participant's willingness to take part in peer review, because confidential records may be discoverable and participants may face treble damages for conduct rarely covered by insurance. Robert S. Adler, *Stalking The Rogue Physician: An Analysis Of The Health Care Quality Improvement Act*, 28 Am. Bus. L.J. 683, 698 (1991); *see Marrese v. Interqual, Inc.*, 748 F.2d 373, 391 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

Concerned that the increasing number of physicians' antitrust lawsuits was stifling the peer review process, Congress enacted the HCQIA in 1986, giving incentives and protection to peer review participants. § 11101(4), (5). The Courts of Appeals that have interpreted the Act – including the Court below – have unanimously acknowledged that this was its purpose. (Pet. App. 11a); *accord Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994); *Hancock v. Blue Cross-Blue Shield of Kansas, Inc.*, 21 F.3d 373, 374 (10th Cir. 1994); *Manion v. Evans*, 986 F.2d 1036, 1041 (6th Cir.), *cert. denied*, 114 S. Ct. 71 (1993); *Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir. 1992); *Lie v. St. Joseph's Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992); *see also Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1061 (E.D.Cal. 1992), *aff'd*, 29 F.3d 1439 (9th Cir. 1994).

To encourage peer review, Congress conferred immunity on peer review participants when an action has been taken against a physician reasonably and in furtherance

of patient care. §§ 11101-15; *see Bryan*, 33 F.3d at 1321; *Austin*, 979 F.2d at 733. In general such action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Section 11112(a). These criteria are presumed satisfied unless the plaintiff rebuts the presumption by a preponderance of the evidence. *Id.*; *Bryan*, 33 F.3d at 1333; Pet. App. 13a.

Petitioner claims there is a conflict among the circuits, contending that the Court below "ignored" the first three elements of the section 11112(a) analysis and based its decision only on the fourth. (Pet. 16) He relies on the following passage from the Court's opinion:

> The rebuttable presumption 'creates a somewhat unusual standard' of review for summary judgment because the 'inquiry focuses on whether [the plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts.' (Pet. App. 13a, *quoting Austin*, 979 F.2d at 734)

Petitioner contends that the Court of Appeals' decision here conflicts with the Eleventh Circuit's analysis in *Bryan*, 33 F.3d 1318, and the Ninth Circuit's analysis in

Austin, 979 F.2d 728, both of which required the defendant to satisfy all four elements of the immunity analysis. (Pet. 17)

But petitioner's argument stems from a faulty premise. The Court below did not ignore the first three immunity elements, but analyzed each and properly applied rebuttable presumptions to them. It noted that Good Samaritan began reviewing petitioner after California's Board of Medical Quality Assurance notified it that petitioner's privileges had been revoked at another hospital, that the peer review participants at Good Samaritan found that petitioner's treatment of patients was inadequate, and that petitioner never challenged the substance of the reviewers' findings. Thus, the Court of Appeals concluded, petitioner could not rebut section 11112(a)(1)'s presumption that the peer reviewers "would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients." (Pet. App. 13a, *citing Austin*, 979 F.2d at 734 (internal quotations omitted)). In similar fashion, the Court of Appeals analyzed Good Samaritan's investigation and hearing procedures and concluded that petitioner could not rebut the presumptions that "the termination of his staff privileges was made after a reasonable effort to obtain the facts" and that "the procedures were adequate." (Pet. App. 14a-16a) Only then did the Court of Appeals conclude under the fourth element that Good Samaritan reasonably believed its action was warranted and that it was entitled to immunity and summary judgment. (*Id.* at 17a)

Thus, the Court of Appeals paid proper attention to each immunity element and found that petitioner did not rebut the presumption that Good Samaritan had satisfied them. That analysis is in accord with *Bryan*, 31 F.3d at 1334-37. There, the Eleventh Circuit – using the same review standard applicable on review of a summary judgment – held that the district court should have granted

the defendants' motion for a directed verdict on HCQIA immunity, reasoning that no reasonable jury could conclude that the defendants' actions fell outside the scope of each of the immunity elements. *Id.* at 1333-34. That is the same analytical path by which the Court below affirmed summary judgment. That the Court below articulated its review standard in terms of only the fourth immunity element is a distinction without a difference. (*See* Pet.App. 13a) Like *Bryan*, the Court below applied that standard in its analysis of *each* of the four immunity elements. Accordingly, there is no conflict.

Nor is there any conflict over the interpretation of the "adequate procedures" immunity element. A health care provider is entitled to immunity if it meets the other section 11112(a) requirements and gives the physician "adequate notice and hearing procedures . . . or . . . such other procedures as are fair to the physician under the circumstances." § 11112(a)(3). Section 11112(b)(3) enumerates "safe harbor" hearing procedures that in every case will entitle a health care provider to immunity. However, the statute also states that a provider's failure to follow those procedures "shall not, in itself, constitute failure to meet" the fair hearing requirement. § 11112(b)(3); Pet. App. 58a-60a. Not surprisingly, the case law uniformly holds that Congress meant what it said. *Bryan*, 33 F.3d at 1323, 1335-36; Pet. App. 11a-12a n.5, 14a. For this reason, the determinative inquiry is always whether the procedures were "adequate." *Fobbs*, 789 F. Supp. at 1068; Pet. App. 14a.

Petitioner concedes "[f]or the sake of a minimal rights discussion" that a health care provider may afford physicians either the procedures enumerated in section 11112(b) or other "fair" procedures. (Pet. 15, n.15) However, he argues that these "other" fair procedures merely "explain" the meaning of "adequate procedure" in section 11112(a)(3) such that a health care provider is not entitled to immunity unless it afforded the physician the

precise procedures spelled out in section 11112(b). (Pet. 15, n.15, *see also* Pet. 12-15) Petitioner cites no authority for his argument, because none exists. Although the *Austin* Court of Appeals stated that defendants seeking immunity must "satisf[y] § 11112(b)'s requirement of adequate notice and hearing" [*Austin*, 979 F.2d at 733], as the Court of Appeals here explained, because "adequate procedure" was not at issue in *Austin*, that statement was dicta to the extent it could be read as requiring a defendant to satisfy section 11112(b)'s terms in every instance. (Pet. App. 11a-12a, n.5) Thus, *Austin* does not support petitioner's position, and he can point to no decision that does.

The "conflict" in the interpretation of the Act that petitioner wants this Court to resolve is nonexistent. On this ground there is no basis for review.

2. The Courts Of Appeals Are Not In Conflict Over The Summary Judgment Procedure In HCQIA Immunity Cases

Petitioner contends that the Court "departed from . . . traditional [Federal] Rule [of Civil Procedure] 56(e) analysis" by not affording him the benefit of all reasonable inferences. (Pet. 17) Combining this argument with his claim that the Court of Appeals improperly skipped elements of the immunity analysis, petitioner contends that the Court of Appeals did not conduct a thorough analysis of the evidence petitioner offered in opposition to Good Samaritan's summary judgment motion.

Once again, petitioner's premise is faulty. The Court of Appeals' opinion reflects a painstaking review of the evidence petitioner offered to rebut Good Samaritan's claim of immunity. Rather than "ignoring" that evidence or denying petitioner reasonable inferences, the Court below found that his evidence would not permit a jury to

find that he overcame by a preponderance of the evidence the presumption that Good Samaritan's actions met each immunity element [Pet. App. 13a-17a] – *i.e.*, that his evidence did not create a genuine, material factual issue on any of the ingredients in the immunity calculus. That result was correct under generally applicable summary judgment principles and it was in accord with other decisions that have interpreted the Act. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bryan*, 33 F.3d at 1334-37; *Austin*, 979 F.2d at 733-35; *Fobbs*, 789 F. Supp. at 1061.

As to the first and second immunity elements, petitioner argued in the Court of Appeals (as he argues here), that Good Samaritan did not initiate the action against him in the reasonable belief that it would further quality health care and that Good Samaritan did not conduct a reasonable investigation. He claimed that because Good Samaritan did not undertake a statistical comparison of his performance with that of other internists to determine which physician was "the worst," the initiation and fact-gathering parts of the process were unlawfully flawed. (Pet. 21, n.18; *see* Summary Judgment AOB at 16, 23, 35-36, 44-45, 49) To support this claim, petitioner argued in both courts below that such comparison surveys are *required* components of peer review. (Summary Judgment AOB at 23, 35-36, 44; SER 411-412; CR 88; CR 53 at 22-23; *see* Pet. App. 52a)

Both the district court and Court of Appeals properly rejected this argument. (Pet. App. 14a, 39a) The Court of Appeals held that a hospital need not obtain or analyze comparison data regarding other physicians' performance before disciplining one of its staff physicians who has performed in an incompetent manner and endangered patient safety. (Pet. App. 14a); *see Morgenstern v. Wilson*, 133 F.R.D. 139, 142 (D. Neb. 1990); *Williams v. Kleaveland*, No. C 78-647, 1983 WL 1844, *25 (W.D. Mich. Jan. 27, 1983); *Glover v. Board of Medical Quality Assur.*, 231

Cal. App. 3d 203, 208-09 (1991). It would be absurd and unwise to require a hospital to undertake the Herculean task of reviewing and comparing the performance of each staff physician each time it sought to take adverse action against an incompetent one. *Cf. Gill v. Mercy Hosp.*, 199 Cal. App. 3d 889, 908, *cert. denied*, 488 U.S. 892 (1988). On this point there is no basis for review.[2]

As to Good Samaritan's effort to obtain the facts, petitioner recycles his claims that "outside reviewers" were required to review petitioner's performance and that Good Samaritan "suppressed" evidence favorable to him. (Pet. 18-21, citing *Austin v. McNamara*, 731 F. Supp. 934, 936 (C.D. Cal. 1990), *aff'd*, 979 F.2d 728 (9th Cir. 1992); *Fobbs*, 789 F. Supp. 1054, and *Islami v. Covenant Medical Ctr., Inc.*, 822 F. Supp. 1361, 1380 (N.D. Iowa 1992); Pet. App. 51a, 54a) Neither claim is a basis for granting certiorari. None of the decisions petitioner cites holds that immunity depends on an "outside" review that corroborates a health care provider's findings. Nor was favorable evidence – a purported nurse's "eyewitness" report and an outside consultant's report – improperly "suppressed." Petitioner had no right to the "eyewitness" report as it was attorney-client privileged, and he could have obtained the outside consultant's report merely by asking his own consultant for it. *Sierra Vista Hosp. v. Superior Court*, 248 Cal. App. 2d 359, 363, 369 (1967); *see*

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[2] Petitioner suggests that Good Samaritan acted improperly by failing to comply with the magistrate judge's order compelling production of comparison evidence and alleged "audits" of Good Samaritan's cardiology division. (Pet. 21, n.18) Good Samaritan timely moved the district court for reconsideration of that order soon after it was issued. (CR 71, 72, 73; SER 403-06) The reconsideration request was pending when the district court granted summary judgment. That judgment effectively rendered the reconsideration request and magistrate judge's order moot.

ER 536-37. The Court of Appeals properly rejected any claim that Good Samaritan failed to make reasonable efforts to obtain the facts.

Petitioner's next argument as to why Good Samaritan should not be entitled to immunity centered on the supposed lack of fair hearing procedures afforded him during the peer review process.[3] The Court of Appeals

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[3] Petitioner has "catalogued" his list of alleged "unfair peer review acts" in his Appendix F. That appendix is an attempt to offer further argument when he has exhausted his page limit, and for that reason alone the Court should disregard it. S. Ct. R. 24.3. In any event, the claims are meritless. For example, petitioner accuses Good Samaritan of imposing an "upside down" burden of proof at the peer review hearings. (Pet. App. 55a) But the burden of proof complied with the law in effect at the time – that the medical staff make a substantial showing to support the charges. *Anton*, 19 Cal. 3d at 828-30; *see also Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434, 1449 (1991); *Gill*, 199 Cal. App. 3d at 905; *see* SER 260 ¶ 3.12-1.6, 267 ¶ 3.13.2. Although a different burden was enacted into state law effective January 1, 1990 [Cal. Bus. & Prof. Code § 809, enacted by Cal. Stats. 1989, c. 336, § 2], this change in the law did not affect the hearing here, which occurred before that date. In any event, it is hard to understand how petitioner was prejudiced by the burden that did apply, since the hearing panel found in his favor. *See Anton*, 19 Cal. 3d at 826.

Another example of a meritless claim is that petitioner's counsel was denied the opportunity to cross examine witnesses and was relegated to the role of a "potted plant" at the hearings. (Pet. 13; Pet. App. 54a) But California law does not give a physician the unfettered right to be represented by counsel in a peer review proceeding. *Gill*, 199 Cal. App. 3d at 901-02; *accord Anton*, 19 Cal. 3d at 827; *see* Cal. Bus. & Prof. Code § 809.3(c). Accordingly, Good Samaritan's bylaws limited an attorney's role at such hearings to pointing out procedural errors and advising the client. (SER 260 at ¶ 3.12-1.3) Here, both petitioner's physician representative, Dr. Douville, and his attorney attended the hearings. (SER 221) Dr. Douville cross-

properly rejected this claim as well, finding the procedures adequate. There is no reason to review that decision.

Each of the nine days of peer review hearings was transcribed by a court reporter. (*See* SER 1-168) Petitioner's counsel attended the hearings, where petitioner was represented by a physician-spokesperson. (SER 2, 221) Seven physicians sat on the hearing panel and were advised by counsel. (SER 2-32, 220-21) The panel's counsel questioned each panel member in detail concerning possible bias (including patient referrals and financial interest in the outcome of the proceedings); two ultimately recused themselves (including the "patient of [respondent] Dr. Ricks" identified at Pet. App. 53a, who became an alternate panel member). (SER 6-11, 18, 21-32, 220; *see* ER 581) The panel disallowed petitioner's counsel's voir dire questions as irrelevant to bias or improper attempts to obtain discovery. (SER 11-14, 34, 389-91)[4]

At the hearing, petitioner introduced 22 exhibits and had access to all evidence the medical staff introduced against him. (SER 12, 377-78) Petitioner testified on his own behalf and called one expert witness. His physician

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examined witnesses – as the bylaws permitted – and even made it clear that petitioner's counsel should not interrupt. (SER 264 at ¶ 3.12-2.7, 396) Counsel was permitted to advise Dr. Douville as to any matter the witnesses raised. Neither federal nor state law entitled petitioner to have *both* counsel and Dr. Douville cross-examine. Accordingly, the limits placed on counsel were appropriate.

[4] Examples of these excluded voir dire questions included inquiries about panel members' "personal non-medical business-mutual investments" and their social relationships with Good Samaritan staff, and whether the panel members thought "ideal standards of perfection" should govern privileges issues. (*Id.*)

representative cross-examined all four medical staff witnesses. (ER 230, *see* SER 3, 52, 68, 124) After the hearings, the panel rendered a written decision. (SER 218-27) On appeal to the Board of Trustees, petitioner submitted a written statement and was represented by counsel. (SER 169-217, 230, 233-35, 373-74) Petitioner's counsel conducted extensive voir dire of the Board members; two recused themselves because of previous involvement with petitioner or his patients. (SER 176-205, 209-10A) Several other members to whom counsel objected were permitted to serve because they were neither biased nor prejudiced. (SER 205-09; 210A-10B, 214, 231-32) After listening to both sides' arguments, the Board rendered a unanimous written decision concluding that, given petitioner's repeated substandard treatment of patients, safety concerns required denial of petitioner's reappointment to the medical staff. (SER 238-41, 247-48)

Despite this impressive list of procedures, petitioner claims – as he has throughout this case – that the procedures were inadequate to entitle Good Samaritan to immunity. The Court of Appeals carefully considered and rejected each of these claimed "procedural defects," noting that the Act does not require peer review proceedings to "look like regular trials in a court of law" to entitle a provider to immunity. (Pet. App. 16a) Rather, the Court concluded, Good Samaritan's procedures either met all the "safe harbor" requirements of section 11112(b) or came so close that no reasonable jury could find petitioner rebutted the presumption that Good Samaritan's procedures were adequate. *Id.*; Pet. App. 16a.[5]

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[5] Although none of petitioner's procedural objections has merit, one deserves rejoinder because it is particularly misleading and unfair. Petitioner argues that respondent Keith Bartel, a cousin of one of petitioner's cardiologist colleagues at Good Samaritan, should not have acted as the hearing panel's "law officer," making "rulings" against petitioner. (Pet. at 12, 19-20)

Petitioner has not shown, because he cannot, how the Court of Appeals erred in reaching that conclusion, let alone that any such error warrants this Court's intervention. Although he contends that Good Samaritan's purportedly flawed procedures showed its lack of "good faith," he never explains how good faith or its absence is relevant to immunity. (Pet. 20, *citing Harris v. Bellin Mem. Hosp.*, 13 F.3d 1082, 1087 (7th Cir. 1994)) That is not surprising, because it is not. Indeed, the three courts of appeals that have examined this issue have agreed that section 11112(a)'s standards are objective and that good faith or its absence has nothing to do with whether a physician was afforded fair peer review. *Bryan*, 33 F.3d at 1323; *Austin*, 979 F.2d at 733; *see* Pet. App. 13a.

Nor should the Court grant certiorari to "define" the peer review "hearing and appeal procedures" that entitle a health care provider to immunity. (Pet. 30) First, as the Court of Appeals found, section 11112(b) – which defines the minimum procedures required for immunity – is not ambiguous. (Pet. App. 18a) While the Secretary of Health and Human Services has not yet issued regulations concerning the required procedures (as she is permitted to do under § 11114 [*see* Pet. App. 61a]), the lower courts have had no trouble applying the Act's criteria. Indeed, petitioner has identified no conflicts regarding the meaning of the section 11112(b) requirements or what procedures satisfy the "adequacy" standard under section 11112(a)(3) when a provider has not entered the "safe harbor" of

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Mr. Bartel was the legal adviser to the hearing officer and to the panel. The hearing officer, not he, presided over the hearing, and the panel, not he, made the decision. (SER 220, 227, 380-81) Furthermore, Mr. Bartel saw his cousin only once in the 20 years preceding the hearing. (SER 245) None of this provided any reason for his recusal. *Rhee v. El Camino Hosp. Dist.*, 201 Cal. App. 3d 477, 493-94 (1988).

section 11112(b). The existing case law provides an adequate framework with which the lower courts are able to dispose of cases in a uniform fashion, a fact that shows that this Court's intervention is not required. *Compare Islami*, 822 F. Supp. at 1373, 1377, 1379 (denying summary judgment on immunity because hospital did not provide an impartial hearing panel or a full record of the proceedings and denied the physician the opportunity to cross-examine witnesses) *with* Pet. App. 13a-17a (summary judgment proper because all Act's requirements met).

In any event, petitioner is not really asking the Court to *interpret* what Congress stated to be the hallmarks of fair procedure, but to rewrite the Act to conform to his particular vision of what the Act ought to say. This Court should decline the invitation. *In re Blackwell*, 115 B.R. 86, 88-89 (Bankr. W.D. Va. 1990); *see Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1332 (5th Cir. 1976).

In sum, the Court of Appeals properly concluded that petitioner had no evidence to rebut the Act's immunity presumptions and that the district court properly granted Good Samaritan summary judgment. That decision falls squarely in line with other Court of Appeals' decisions, both as to immunity and summary judgment standards. There is no reason to grant the petition on the basis of any purported "conflict."

B. The Petition Raises No Other Important Question Of Federal Law

Petitioner's remaining claims concern the district court's fees and costs award against petitioner and the Court of Appeals' fees and costs award against his counsel. None of the claims raises an issue of federal importance.

1. The Petition Raises No Important Question Of Federal Law Regarding An Immune Defendant's Entitlement To Fees And Costs In A Frivolous Case Disposed Of On HCQIA Immunity Grounds

When Congress sought to promote peer review by giving immunity to health care providers who participate in a bona fide peer review process, it also concluded that immunity alone would not deter meritless suits by disaffected physicians. Congress therefore added a provision mandating an award of reasonable attorneys' fees and costs to defendants who "substantially prevail" in such actions if the plaintiff's claims or the conduct of the litigation were "frivolous, unreasonable, without foundation, or in bad faith." § 11113; *see Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992); *Farr v. Healtheast, Inc.*, No. CIV. A. 91-6960, 1993 WL 220680, at *13 (E.D. Pa. Jun. 9, 1993); *Wei v. Bodner*, No. CIV. 89-1137, 1992 WL 165860, at *2 (D.N.J. Apr. 8), *aff'd*, 983 F.2d 1054 (3d Cir. 1992); (Pet. App. 17a). This fee- and cost-shifting provision serves the Act's overall purpose by reducing the economic risk of participating in peer review.

Section 11113 was modeled on similar federal statutes (such as Title VII and 42 U.S.C. § 1988), that award fees to the "prevailing party" where the lawsuit was frivolous, unreasonable, without foundation, or in bad faith. 132 Cong. Rec. at H11591 (daily ed. Oct. 17, 1986); H.R. Conf. Rep. No. 1044, 98th Cong., 2d Sess. 15 (1984), *reprinted in* 1984 U.S.C.C.A.N., 3131, 3140; *see Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2, 433 n.7 (1983); *see also* Fed. R. Civ. P. 11; *Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1422 (9th Cir. 1988). Under Title VII, a claim is "frivolous" or "without foundation" if it is factually baseless or groundless. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421-22 (1978). Similarly, under Fed. R. Civ. P. 11, a "frivolous" claim is one made without adequate inquiry into the supporting facts or law. *Townsend v.*

Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 n.7 (9th Cir. 1986). The determination whether a plaintiff's claims or conduct meet the criteria for a fees and costs shift under section 11113 lies within the district court's discretion and will not be disturbed absent a finding of abuse. *Johnson*, 964 F.2d at 123-24, *citing Christiansburg*, 434 U.S. at 421; Pet. App. 18a.

The Court of Appeals upheld the district court's fees and costs award and its findings that petitioner's claims were "at best without foundation, and at worst frivolous," and that his conduct of the litigation was "aggressive[ ], and, at times, inappropriate[ ]." (Pet. App. 18a, 48a) Despite petitioner's contentions (Pet. 22-23), neither decision below constitutes such a "depart[ure] from the accepted and usual course of judicial proceedings" as to warrant this Court's "power of supervision." S. Ct. R. 10.1(a).

The courts below based the fee award on several grounds. First, a minimal inquiry would have shown that Good Samaritan was immune under the Act because it met the section 11112(a) standards. As the Court of Appeals noted, because the statute clearly states the fair procedure and reasonableness immunity standards, "it is difficult to argue the statute was ambiguous." (Pet. App. 18a) Thus, petitioner should have known that his lawsuit would fail.

Second, even if petitioner could have rebutted the immunity presumption, he still had no evidence to suggest that Good Samaritan had engaged in a conspiracy or other conduct in restraint of trade that rose to the level of an antitrust violation. (*Id.*) Rather, petitioner had only "the accusations of [his] counsel," which primarily centered on the same laundry list of purported "procedural defects" that he claimed deprived Good Samaritan of immunity. (Pet. App. 47a ["the substance of [petitioner's] entire case revolved around that one issue [lack of due

process during peer review]"]; Pet. App. 18a ["At best, [petitioner] pointed out some procedural defects in the hearing process."]). Because the peer review process had none of the purported defects petitioner claimed, those "defects" could obviously not support an antitrust violation.

Petitioner faults the courts below for appearing to require "direct evidence" of a conspiracy, which is not required under the antitrust laws. (Pet. 22) But as the Court of Appeals noted, the district court was not using that phrase in its literal or technical sense. (Pet. App. 18a) And, even in this Court, the primary "inference evidence" petitioner offers to support his conspiracy theory are the same supposed "procedural defects" that he said should have defeated immunity. (Pet. 23; *see also* Pet. 20)[6] Accordingly, the courts below correctly found that petitioner's claims lacked foundation.

Finally, petitioner's frivolous conduct of the litigation amply supported the fee award. (Pet. App. 17a-18a, 48a) His unreasonable and harassing discovery requests, his repeated filing of improper and unauthorized documents, his uncooperative litigation posture, and his baseless assertions that Good Samaritan had engaged in improper conduct all supported that conclusion. (*See* Fees and Costs AB at 6-7, 21-23; Sanctions AB at 32-33; and record

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[6] Petitioner claims that evidence of a "new heart clinic costing $1.1 million" supports his "concerted action" theory. (Pet. 23) But Petitioner does not explain how or why the existence of that clinic permits an inference of conspiracy. Nor does petitioner's allegation that Good Samaritan purchased Mission Oaks Hospital to "enlarge" its power so it could then "bar[ ]" him from practicing there support his antitrust claims. (*See* ER 24-25 ¶¶ 30-32; *see* Pet. 7) After Good Samaritan acquired Mission Oaks, the medical staff was dissolved and petitioner was invited to reapply to the newly-reconstituted staff. He declined. (ER 616-17; SER 416)

citations therein); *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470, 1477 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985); *see Farr*, 1993 WL 220680, at *14).[7]

Nor does petitioner's claim that the fees and costs award was too high furnish a basis for granting his petition. (Pet. 23-24) The magistrate judge to whom the district court referred calculation of the fees and costs conducted a careful *in camera* review of unredacted monthly billing statements that showed daily time entries broken down by task, in six-minute increments. (ER 1370-71, 1538, 1545; *see* ER 1372-95; CR 137 Exh. A)[8] After a "painstaking" review, the magistrate judge reduced the amount claimed by approximately six percent and recommended that the district court award the remainder to Good Samaritan, which it did. (ER 1537-45, 1564, 1569-71, 1573-74)[9]

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[7] One of the more egregious liberties petitioner takes with the record is that respondent Dr. Nagel "killed" a patient and then tried to "coverup" the "killing" by avoiding an autopsy. (Pet. App. 52a) Petitioner's own evidence shows that the patient died during a catheterization procedure, that the case was reviewed as part of Good Samaritan's quality assurance program, and that Dr. Nagel properly reported the death to the coroner. (ER 21, 205, 359, 560, 1181-82 & n. 6; SER 242, 527-28, 537-41)

[8] Petitioner claims that the magistrate judge reviewed only the "attorney recap" portion of the billing statements. (Pet. 24) Not so. Good Samaritan originally submitted monthly invoices showing hourly rates and total hours billed by attorneys and others [ER 1209, 1220-32], but later submitted full, unredacted computerized billing statements. (ER 1370-71)

[9] The fees and costs awarded were actually 13 and 29 percent less, respectively, than Good Samaritan had incurred by the date it submitted the last billing statements to the magistrate judge. She apparently based her award on billing statements for

Given the thoroughness of the process and the result – both of which the Court of Appeals endorsed – it makes no sense for this Court to review the fees and costs issue. That is particularly true given that all petitioner can offer is the claim that the award was too high because too much lawyer time was spent litigating the case – a claim that this Court must compare to contrary case law. *See Frantz v. U.S. Powerlifting Fed'n*, 836 F.2d 1063, 1065 (7th Cir. 1987) (antitrust suits are "easy to file, yet notoriously costly to defend"); *Unioil, Inc. v. E. F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986) (where complaint threatens to impose massive liability on multiple defendants, substantial fees are reasonable), *cert. denied*, 484 U.S. 822 (1987); *see also Wei*, 1992 WL 165860, at *6-7 (awarding approximately $459,000 in attorneys' fees under § 11113 for 2,797 hours reasonably spent). Moreover, petitioner has only his own counsel to blame for the amount of the award, as his frivolous litigation tactics and unreasonable discovery requests were in large part the reason why the fees and costs climbed so high. *See Frank Music Corp. v. M.G.M., Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *Copeland v. Marshall*, 641 F.2d 880, 904 & n.53 (D.C. Cir. 1980).

Furthermore, Petitioner was not deprived of an adequate opportunity to contest the claimed fees. Petitioner received copies of the detailed billing statements, with attorney-client privileged information redacted as the law permits. *See In re Horn*, 976 F.2d 1314, 1317-18 (9th Cir. 1992); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982); (CR 137 Exh. A, 139; ER 1372-95). The magistrate judge's *in camera* review of the

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fees and costs incurred up to the date of the district court's grant of summary judgment, and excluded fees and costs for later proceedings. (ER 1209, 1370, 1538-39, 1570-71; SER 559 & n.2)

unredacted billing statements was not a denial of "due process," but was a necessary step to protect privileged information. *FSLIC v. Ferm*, 909 F.2d 372, 374-75 (9th Cir. 1990); *In re Rheuban*, 121 B.R. 368, 384 (Bankr. C.D. Cal. 1990); *see* N.D. Cal. R. 270-2. And, because Good Samaritan was not required to submit the handwritten daily time entries of its attorneys, the district court properly declined to enforce petitioner's subpoena requesting such records. (SER 499-513) *See, e.g., Davis v. City & County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *citing Hensley*, 461 U.S. at 437 n.2, *vacated in part on other grounds*, 984 F.2d 345 (1993); *Frank Music*, 886 F.2d at 1557; *Dennis*, 611 F.2d at 1308.

Finally, the award of fees here will not "chill" legitimate advocacy, as petitioner suggests. (Pet. 24) The district court awarded fees precisely because it concluded that petitioner's claims and tactics were *not* legitimate. (Pet. App. 46a-48a) The Court of Appeals' affirmance of that award together with its own award of frivolous appeal sanctions confirms this conclusion. (Pet. App. 17a-18a, 20a-22a)

Rather than chilling legitimate advocacy, the fees and costs award here promotes the Act's purpose by causing disciplined physicians and their attorneys to think twice before filing an expensive, time-consuming, and wholly meritless lawsuit against peer reviewers. *See Ezpeleta v. Sisters of Mercy Hosp.*, 800 F.2d 119, 122 (7th Cir. 1986). That was precisely what the district court found, and the Court of Appeals' affirmance of the judgment reflects its agreement with that reasoning. (Pet. App. 48a) There is no basis for granting the petition on this ground.

2. The Petition Raises No Important Issue Regarding The Court Of Appeals' Decision To Sanction Petitioner's Counsel For Pursuing A Frivolous Appeal

Petitioner contends the Court of Appeals erred in ordering his counsel to pay Good Samaritan its appellate attorneys' fees and costs under Federal Rule of Appellate Procedure 38. Even if this Court has jurisdiction over this claim [*see supra* at 2], the issue does not warrant review.

a. The Court Of Appeals Properly Found Counsel's Arguments Wholly Without Merit And Correctly Exercised Its Discretion To Impose Frivolous Appeal Sanctions On Petitioner's Counsel

Federal Rule of Appellate Procedure 38 affords the courts of appeals "plenary discretion" to award an appellee attorneys' fees for having to defend a frivolous appeal. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987). An appeal is "frivolous" when the result is obvious or the arguments of error are wholly without merit. *In re Marquam Inv. Corp.*, 959 F.2d 800, 801 (9th Cir.), *cert. denied*, 113 S. Ct. 676 (1992); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 444 (9th Cir. 1991). Here, the Court of Appeals found the appeal was "frivolous, unreasonable, and without foundation," and "wholly without merit," and that it "wasted [the] court's time" and "forced Good Samaritan to incur great expense." (Pet. App. 21a-22a) The Court based those conclusions on two factors relating to the merits of petitioner's arguments: (1) the law clearly entitled Good Samaritan to immunity and (2) petitioner had no evidence to support his antitrust claims. (*Id.*) The Court further decided that petitioner's counsel rather than his client should be assessed the fees and costs, because counsel, not petitioner, was "truly at fault in pursuing this meritless

claim." (*Id.* at 21a) These conclusions represent a proper exercise of the Court of Appeals' discretion and present no issue worthy of review.

Petitioner claims that the Court erroneously sanctioned his counsel for arguing that immunity depended on "various state law decisions and professional guidelines" rather than the "text of the HCQIA." In his view, because counsel was merely arguing for an extension, modification, or reversal of existing law, sanctions were improper. (Pet. 25; Pet. App. 21a) This claim lacks merit.

In both courts below, petitioner argued that Good Samaritan was not immune because it had not complied with various state laws and industry guidelines, such as the burden of proof and voir dire requirements of California Business & Professions Code Section 809 and the impartial investigation and unlimited cross-examination guidelines promulgated by the American Medical Association, the California Medical Association, and the Healthcare Committee of the American Bar Association. (Summary Judgment AOB 8, 36-37, 41-43) But the HCQIA's legislative history is unambiguous in stating that if a health care provider satisfies the Act's immunity requirements, state law is irrelevant. *See* H.R. Rep. 903, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393; 132 Cong. Rec. at H11590; 135 Cong. Rec. E4137, E4138 (daily ed. Dec. 11, 1989); *cf. Fobbs*, 798 F. Supp. at 789. That same logic applies to industry guidelines, which do not even have the force of state law.

Accordingly, petitioner's claim that he was merely arguing in "good faith" for an extension, modification or reversal of existing law is misplaced. (*See* Pet. 29) He should have known that federal courts do not "modify" Congress's express language or insert requirements that it intentionally omitted. *In re Blackwell*, 115 B.R. at 88-89; *see Doski*, 539 F.2d at 1332. The Court of Appeals correctly exercised its discretion on this ground.

The Court of Appeals also found that because petitioner had no evidence to support his claims, Good Samaritan was clearly entitled to immunity and any appeal was doomed. (Pet. App. 21a-22a) That, too, was a proper exercise of discretion. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 653-54 (9th Cir. 1988) (appeal of dismissal of claims which were clearly barred is frivolous); *accord Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984).

The Court of Appeals further based its Fed. R. App. P. 38 sanction on the frivolousness of counsel's Fed. R. Civ. P. 11 sanctions appeal – an appeal that it found "so frivolous that one need only recite his claims to recognize their absurdity." (Pet. App. 21a) In that appeal, counsel contested a $2,000 sanction imposed for filing – without reading – a "renoticed" motion to "correct" the district court's fees and costs order (he said he thought it was a notice of appeal), arguing that the filing was merely a "stupid mistake." (Pet. App. 19a-20a, ER 1016) Given Fed. R. Civ. P. 11's clear "read-before-filing" command and voluminous Ninth Circuit rejection of the "pure heart but empty head" defense, the Court of Appeals found that appeal without any arguable merit. *Id.*; *e.g.*, *Lloyd v. Schlag*, 884 F.2d 409, 413 (9th Cir. 1989); *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987); *Zaldivar*, 780 F.2d at 830. That finding as well was an appropriate exercise of discretion.

Petitioner claims that his appeals were not frivolous because no published decision had yet interpreted the Act's fair procedure requirements. (Pet. 27) But an absence of appellate interpretation alone does not justify an appeal where – as here – no reasonable attorney would have appealed and argued that the text of the HCQIA does not mean what it says. While some cases may present arguable questions about a health care provider's compliance with fair hearing procedure requirements [*e.g.*, *Islami*, 822 F. Supp. at 1377-79 (denying immunity

because hospital did not follow its own bylaws, which track the Act's standards)], this was not one of them.

Petitioner also asserts that the Court of Appeals' decision to hear oral argument demonstrates that the appeal was not frivolous. (Pet. 27-28) But while Fed. R. App. P. 34(a)(1) and Ninth Circuit Rule 34-4(a) *permitted* the Court of Appeals to dispense with oral argument if all three judges on the panel concluded it was frivolous, the Court was not *required* to do so. Surely in setting oral argument, the Court of Appeals did not "waive" its right to impose frivolous appeal sanctions.

Nor did the Court of Appeals err in deciding to impose the sanctions on petitioner's counsel. Finding it was unclear whether section 11113 authorized an award of fees against counsel, the court awarded them under Fed. R. App. P. 38. (Pet. App. 21a-22a, *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 & n.9 (1980)). That decision was consistent with several other decisions holding that Fed. R. App. P. 38 sanctions may be assessed against counsel. *E.g., In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989); *Coghlan v. Starkey*, 852 F.2d 806, 818 (5th Cir. 1988); *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987). After all, imposing fees on counsel more effectively fulfills Fed. R. App. P. 38's deterrent purpose, as counsel rather than the client is often in the best position to determine whether to take an appeal. *Cf. In re Becraft*, 885 F.2d at 548-50.

Petitioner nevertheless argues that to saddle counsel with the sanction was improper, given counsel's history "in the front line of the physicians' struggle for due process in hospital hearings." (Pet. 25) No amount of self-perceived White Knight status in this purported "due process struggle" excuses pursuing a totally baseless appeal. Any reasonable attorney – perhaps counsel even more so, given the wealth of his peer review experience –

should have known that the claims on appeal were frivolous because of the clear language of the HCQIA and because Good Samaritan's arguments for immunity, fees, costs, and sanctions were extremely strong. (*See* Pet. App. 21a-22a)

In short, the Fed. R. App. P. 38 sanction was consistent with the Rule's purposes: to penalize the person responsible for taking a frivolous appeal and to compensate Good Samaritan for having to defend the district court's judgment against totally meritless attacks. *See Burlington Northern*, 480 U.S. at 7. The sanctions raise no issue worthy of review.

b. The Court Of Appeals Provided Petitioner's Counsel Adequate Due Process In Imposing Frivolous Appeal Sanctions

Petitioner also seeks certiorari on the ground that Fed. R. App. P. 38 sanctions were imposed without giving his counsel adequate "warning" or "opportunity to protest" the basis for the award. (Pet. 28) This claim also fails to warrant this Court's plenary attention.

After the Court of Appeals filed its opinion, counsel filed fourteen pleadings and one letter protesting the imposition of the frivolous appeal sanctions against him.[10] On several occasions, counsel asked that the Court

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[10] These were: Petition for Rehearing and Request for Rehearing En Banc (Sept. 8, 1994); Request for Proceedings Pursuant to General Order 10.9 (Sept. 8, 1994); Declaration and Memorandum re same (Sept. 8, 1994); Motion For Recusal of merits panel (Sept. 9, 1994); Declaration re same (Sept. 9, 1994); Legal Memorandum re same (Sept. 9, 1994); Petition for Rehearing of Denial of General Order 10.9 Proceedings and Request for Rehearing En Banc (Oct. 18, 1994); Motion for Recusal Regarding Petition for Rehearing of Denial of Motion For Proceedings Under General Order 10.9 (Oct. 18, 1994); Supporting

institute proceedings under Ninth Circuit General Order 10.9 and that the merits panel recuse itself from further proceedings so that there could be "neutral review of this crushing sanction."[11] In these various filings, counsel advanced the same reasons for reversal of the Fed. R. App. P. 38 sanction that petitioner presents here: an alleged lack of notice, the Court's purported misperception regarding counsel's arguments concerning state law fair procedure requirements, and counsel's purported "good faith" belief in the merit of his arguments. Counsel asked the Court of Appeals to vacate the Fed. R. App. P. 38 sanction and "expunge" the offending language from its opinion or to reopen the issue for an order to show cause and further proceedings.

In four separate orders and one letter (dated Oct. 4, 1994, Oct. 5, 1994, Nov. 17, 1994, Dec. 12, 1994, and Feb. 7, 1995), the Court of Appeals denied the Petition for Rehearing, rejected the Request for Rehearing en Banc, and rejected each of counsel's additional requests. (Pet. App. 23a-27a; App. A, B, & C) The Court explained that General Order 10.9 does not require an order to show

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declaration re same (Oct. 18, 1994); Letter requesting that "committee . . . responsible for . . . rules" review the Rule 38 sanction (Nov. 19, 1994); Request for Extraordinary Proceedings and to Recall Mandate (Dec. 12, 1994); Supporting declaration re same (Dec. 12, 1994); Legal memorandum re same (Dec. 12, 1994); and Motion for recusal of merits panel (with 8 exhibits) (Dec. 12, 1994).

[11] General Order 10.9 (App. "D") states that if the court is considering imposing sanctions for frivolous filings, it shall issue an order to show cause and allow the threatened party an opportunity to respond before sanctions are imposed. However, the Order also states that such procedures are *not* required where the opposing party has requested sanctions in a brief or other paper. That was precisely the case here, as Good Samaritan requested that the Court of Appeals award it fees for having to defend the appeal. (Summary Judgment AOB at 48-49)

cause when a party has requested sanctions in a brief, which Good Samaritan had done here. (Pet. App. 25a-27a) Nevertheless, the court reviewed *de novo* the issue of the appropriateness of the Fed. R. App. P. 38 sanction and reaffirmed its decision. (Pet. App. 25a) Furthermore, the merits panel declined to recuse itself because the sanctions issue had been before the full Court as a result of petitioner's first Request for Rehearing en Banc. (Pet. App. 27a) And, it deemed counsel's requests "untimely" and "out of order." (*Id., see also* App. "C") None of these actions even hints at an abuse of discretion, much less affords a basis for certiorari.

Nor is there any merit to petitioner's contention that "no neutrals reviewed the sanction." (Pet. 28) The full court considered the first (September 8) Petition for Rehearing and Suggestion for Rehearing en Banc, in which petitioner raised the Fed. R. App. P. 38 and General Order 10.9 issues. No judge voted to reconsider the judgment. (Pet. App. 27a) And while the full court or judges other than those on the merits panel may not have considered petitioner's various motions [*see* Pet. 28], he offers no authority suggesting that they should have. To the contrary, the merits panel judges were most familiar with the issues in the case, the arguments presented, and the lack of a factual basis for petitioner's claims. They were therefore in the best position to determine whether the appeal was frivolous. To require a different panel of judges to become as familiar with the case merely to review the sanction would be a waste of resources and would unnecessarily prolong this litigation.

Counsel had ample notice that Good Samaritan was seeking fees on appeal and that the Court considered the appeal frivolous. He had an ample opportunity to respond and re-respond to that charge. The Court of Appeals reviewed each of counsel's numerous filings, reconsidered the sanctions *de novo*, and reaffirmed its decision. Nothing in its actions departed from the text of

General Order 10.9 or from the "accepted and usual course of judicial proceedings." S. Ct. R. 10.1(a). Given this impressive record of due process, there is no basis for granting certiorari on the Fed. R. App. P. 38 issue.

CONCLUSION

The Courts of Appeals are not in conflict over the standards that qualify a health care provider for HCQIA immunity. That is because Congress was clear in articulating them and in supplementing that articulation with unambiguous legislative history confirming their "safe harbor" effect. The Court of Appeals applied those criteria correctly, just like courts before and after it. Accordingly, this case presents no important question of federal law. The petition should be denied.

DATED: March 6, 1995

Respectfully submitted,

CROSBY, HEAFEY, ROACH
& MAY
PROFESSIONAL CORPORATION

PAUL D. FOGEL

Attorneys for Respondents
William B. Ricks, et al.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al. Defendants-Appellees.	No. 92-16461 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff, JEROME BERG, Esq., Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-15586 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-16410 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-17300 D.C. No. CV-91-20368-JW ORDER (Filed 10/5/94)

Before: FLETCHER, FERGUSON and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing, Judges Fletcher and Trott vote to reject the suggestion for rehearing en banc, Judge Ferguson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

December 12, 1994

Jerome Berg, Esq.
1255 Post Street, Suite 606
San Francisco, CA 94109

RE: Smith v. Ricks, No. 93-17300

Dear Mr. Berg:

The panel of judges in the above case asked me to respond to your letter of November 18, 1994. Please be advised that the request of rehearing en banc from the denial of your motion for a hearing pursuant to General Order § 10.9 was rejected by the panel. General Order § 6.11. There is no procedure for review of sanctions by the Court's Rules Committee or the Chief Judge. Your request to review the file and for an appointment is denied.

Very truly yours,

Cathy A. Catterson
Clerk of Court

CAC/mmb
c: Paul Fogel

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB. 7, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al. Defendants-Appellees.	No. 93-17300 D. C. No. CV-91-20368-JW ORDER

Before: FLETCHER, FERGUSON, and TROTT, Circuit Judges.

Attorney Berg's request filed December 19, 1994 for extraordinary proceedings and to recall the mandate "for which [to quote his request] no known rule or General Order provides a format" is rejected as inappropriate.

APPENDIX D

Ninth Circuit General Order 10.9

10.9. Sua Sponte Imposition of Sanctions

a. Sanctions Imposed Against Counsel or a Party

Sanctions may be imposed against counsel or a party for conduct that violates the Federal Rules of Appellate Procedure, the Circuit Rules, orders or other instructions of the court, the rules of professional conduct or responsibility in effect where counsel maintains his or her principal office or as authorized by statute. If sanctions appear to be warranted, the following procedures shall apply.

The duty judges may issue an order to show cause that directs a litigant to pay a sanction in the amount determined by the Court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven days from service of the response. Upon review of the response and reply, if any, the judge may deem the order to be discharged or may refer the response to the merits panel or motions panel for an evaluation as to the propriety of sanctions. All dispositions in which orders to show cause have been issued shall specifically address any response or failure to respond to the order.

A motions or merits panel may issue an order to show cause that directs a litigant to pay a sanction in the

amount determined by the court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven days from service of the response. Upon review of the response and reply, if any, the panel may deem the order to be discharged or may impose the sanction. No order to show cause need be issued if a party requests the imposition of sanctions in a motion or brief to which the party opposing sanctions has an opportunity to respond.